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COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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SITTING AT AUSTIN, TEXAS

THOMAS DIXON,
Appellant

v.

THE STATE OF TEXAS,
Appellee

STATE'S BRIEF ON THE MERITS

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Trial Judge:

Honorable Jim B. Darnell, Presiding Judge, 140th District Court of Lubbock County, Texas, Lubbock County Courthouse, 904 Broadway, Suite 349, Lubbock, TX 79401

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TEXAS RULES

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IN THE
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THE STATE OF TEXAS,
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STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas, by and through the Lubbock County Criminal District Attorney, respectfully presents to this Court its brief on the merits in this cause.

STATEMENT OF THE CASE

Joseph Sonnier was found brutally murdered in his home on July 11, 2012—the result of a love triangle turned murder for hire plot. David Shepard, the gunman, pleaded guilty to the offense of capital murder and received a sentence of life imprisonment without the possibility of parole. Appellant's first trial for the offense of capital murder resulted in a mistrial. A jury found Appellant guilty of two counts of capital murder in 2015. Count One of the indictment alleged the offense was committed for remuneration. Count Two alleged the offense was committed in the course of a burglary of a habitation. Appellant was sentenced to life imprisonment without the possibility of parole on both counts.

After both parties had concluded briefing and oral arguments in the court of appeals, the Supreme Court issued its opinion in *Carpenter v. United States*, 585 U.S. --, 138 S.Ct. 2206, 201 L.Ed. 2d 507 (2018), holding that the government's acquisition of cell site location information (CSLI) was a search under the Fourth Amendment, requiring a warrant. The Seventh Court of Appeals reversed Appellant's convictions on December 13, 2018, holding that the erroneous admission of Appellant's CSLI contributed to his conviction beyond a reasonable doubt, and because the trial court violated Appellant's Sixth Amendment right to public trial.[1]

[1] *Dixon v. State*, 566 S.W.3d 348 (Tex. App.—Amarillo 2018, pet. granted June 5, 2019).

STATEMENT REGARDING ORAL ARGUMENT

The Court has determined that oral argument will not be permitted.

ISSUES PRESENTED

1. Did the court of appeals err in finding Appellant's Sixth Amendment right to a public trial was violated on three separate occasions despite evidence showing that: (1) Appellant did not preserve error for two of the three partial closures; (2) members of the public were in fact watching the proceedings during each of the three partial closures; and (3) the trial court made adequate findings to support the partial closures?

2. Did the court of appeals err in its harm analysis by overemphasizing the impact of the admission of the CSLI evidence as important to impeach Appellant's credibility when Appellant's credibility was damaged from the outset, and the admission of CSLI evidence was limited and merely cumulative of other evidence showing Appellant's credibility?

STATEMENT OF FACTS

In 2011, Thomas Michael Dixon (Appellant) had everything going for him: as a successful plastic surgeon he was married with three children and a growing medical practice.[2] Appellant opened a day spa in addition to working as a surgeon at the local hospitals, and it was there he met the woman that would change everything for him.[3] Richelle Shetina—a former professional cheerleader—was tall, beautiful, and paid attention to Appellant in a way his wife of over twenty years did not.[4] Appellant and Richelle began dating and Appellant's marriage dissolved.[5] Newly single, Appellant befriended David Shepard and the two became fast friends.[6]

Shepard was intrigued by Appellant's high lifestyle and courtship of Richelle.[7] In the summer of 2011, Richelle broke things off with Appellant.[8] Appellant was, by his own admission, heartbroken. He "sold his family down the river" for Richelle.[9] Appellant soon learned that Richelle had left him for another physician—Dr. Joseph Sonnier, III, a pathologist in Lubbock, Texas.[10] Wounded, Appellant became obsessed with Sonnier and his relationship with Richelle.[11] Shepard, eager to stay in Appellant's

[2] (RR vol. 17, pp. 42-43, 55-56).
[3] (RR vol. 17, pp. 55-56).
[4] (RR vol. 17, p. 83).
[5] (RR vol. 17, pp. 84-85).
[6] (RR vol. 17, pp. 59-60).
[7] (RR vol. 8, pp. 55-56).
[8] (RR vol. 17, pp. 89-90).
[9] (State's Ex. 806).
[10] (RR vol. 17, p. 96).
[11] (RR vol. 17, pp. 105, 114-18).

good graces, became Appellant's confidant regarding Richelle and Sonnier, and later, his accomplice.[12]

On July 10th, 2012, Sonnier was brutally murdered in his home.[13] The assailant entered the home through Sonnier's back windows where he shot Sonnier seven times and stabbed him eleven times.[14] The state of the house told the story of a struggle—a back window was pushed out, chairs were toppled, a high ball glass and Sonnier's glasses were on the ground, and a trail of blood and cartridge casings led to the garage where Sonnier's body was ultimately found.[15] A Gatorade bottle that appeared to have been used as a makeshift silencer was found just inside of the pushed in window.[16]

The investigation

Sonnier's body was found the day after his murder. Richelle was notified and came to the scene.[17] Her interview with the Lubbock Police Department (LPD) led detectives to Appellant's house outside of Amarillo where Appellant and his new girlfriend, Ashley Woolbert, were interviewed separately that evening.[18] Appellant denied any involvement with the death of Sonnier, and any knowledge of what might have happened.[19] In his first contact with law enforcement, Appellant told the officers

[12] (RR vol. 8, pp. 55-56).
[13] (RR vol. 5, p. 184).
[14] (RR vol. 16, pp. 31, 84, 90).
[15] (RR vol. 5, pp. 186-89).
[16] (RR vol. 5, pp. 186-89).
[17] (RR vol. 5, p. 141).
[18] (RR vol. 6, p. 190; RR vol. 9, p. 60).
[19] (RR vol. 6, p. 193; State's Ex. 806).

he did not know anything about Dr. Sonnier and that he was shocked his name was even mentioned.[20] But Woolbert mentioned to LPD Detective Ylanda Pena that the two had dinner with Shepard the night before—a fact Appellant omitted when speaking to LPD Detective Zach Johnson.[21] As soon as Johnson and Pena left Appellant's house, Appellant and Shepard exchanged several phone calls and text messages, including the following text from Appellant to Shepard: "Just had visit from Lubbock PD, going asap, Ash said came by, said gave cigars from Bermuda, they will see our com phone records tonight anywhere, lay low."[22] Woolbert testified that after Johnson and Pena left Appellant's house on July 11, Appellant acted very odd and was concealing text messages and stepping outside to make phone calls, something he never did under normal circumstances.[23] In the following days, Shepard attempted suicide by slitting his wrist and overdosing on pills.[24] Overcome with emotion one night, Shepard confessed everything to his roommate—Paul Reynolds.[25]

Shepard told Reynolds of the elaborate murder-for-hire plot.[26] Appellant gave Shepard Sonnier's home address, work address, a description of what he drove, and where he practiced ballroom dancing.[27] Shepard followed Sonnier for months, and

[20] (State's Ex. 806).
[21] (RR vol. 9, pp. 60-63; State's Ex. 806).
[22] (RR vol. 12, pp. 116-17).
[23] (RR vol. 10, pp. 188-91).
[24] (RR vol. 8, p. 70).
[25] (RR vol. 8, pp. 70-78).
[26] (RR vol. 8, pp. 70-78).
[27] (RR vol. 8, pp. 70-78).

would often text Appellant while watching Sonnier.[28] On July 10, 2012, Shepard waited in Sonnier's backyard for him to arrive.[29] When he did, Shepard entered Sonnier's home and shot and stabbed Sonnier to death.[30] Shepard explained to Reynolds how he used a Gatorade bottle to muffle the sound of the gunshots, and that Appellant gave him the gun that he used to shoot Sonnier.[31] An Amarillo dive team recovered a gun from Lawrence lake in Amarillo, where Shepard told detectives he threw the murder weapon.[32] Once recovered, the gun was traced to Monty Dixon—Appellant's brother.[33]

After Shepard attempted suicide, Appellant gave Shepard stitches and suggested that he leave town for a couple of weeks.[34] Shepard told Reynolds he was paid in silver bars, worth approximately ten-thousand dollars, for the murder.[35] Johnson and Pena were able to confirm through Leads Online that Shepard pawned one silver bar on June 15, 2012—Father's Day weekend, and two the morning of July 11—the day after Sonnier was murdered.[36]

Appellant claimed Shepard came over the night of the murder so that Appellant could give him some cigars he brought him from Bermuda, and Appellant invited

[28] (RR vol. 8, pp. 70-78).
[29] (RR vol. 8, pp. 70-78).
[30] (RR vol. 8, pp. 70-78).
[31] (RR vol. 8, pp. 70-78).
[32] (RR vol. 12, p. 200).
[33] (RR vol. 12, p. 227; State's Ex. 1631).
[34] (RR vol. 8, pp. 70-78).
[35] (RR vol. 8, pp. 70-78).
[36] (RR vol. 7, pp. 47-48).

Woolbert to join.[37] When asked at trial why Appellant had to give Shepard the cigars that evening, he claimed it was because that was when they were ready after being re-humidified.[38] Yet, the box was unsealed for the first time at Appellant's second trial, where it was revealed to contain a humidor inside—Appellant had no idea if the cigars were ready that evening or not because he had not unsealed the box, discrediting his claim that he needed to re-humidify the cigars.[39]

At some point after Sonnier's murder but before Appellant's arrest, Appellant deleted the majority of the text messages on his phone and jumped in the pool with his phone.[40] But because Appellant had plugged his phone into his laptop, some of the data from the phone transferred to the laptop.[41] DPS Agent Dylan Dorrow was able to recover approximately fifty percent of Appellant's text messages. The text messages revealed an ongoing plot to follow Sonnier, learn his movements, and to "get r done." After the murder, the calls and texts between Dixon and Shepard revealed a continued plot to conceal the murder.

After the arrests of Shepard and Appellant, LPD detectives obtained Appellant's and Shepard's historical CSLI from their respective cell-service providers via court orders.[42] The State presented Shepard's CSLI to the jury at trial, demonstrating months

[37] (RR vol. 10, pp. 165-68, 181).
[38] (RR vol. 18, pp. 75-76).
[39] (RR vol. 18, pp. 79-80).
[40] (RR vol. 18, pp. 131-32).
[41] (RR vol. 18, pp. 131-32).
[42] (CR vol. 1, p. 567).

of travel to parts of Lubbock he knew Sonnier to frequent—Sonnier's home, Richelle's home, and D'Venue. Of the 166 days of Appellant's CSLI obtained by the State, only a portion of 2 days of data was presented to the jury: Appellant's location on March 12, 2012, and June 15, 2012. The CSLI placed Appellant and Shepard in Lubbock, pinging off the same cell towers around the same times on March 12, 2012.[43] On direct examination, Appellant told the jury he was in Lubbock that day——but denied being with Shepard.[44] The CSLI presented to the jury also showed Appellant to be in Amarillo on June 15, 2012, the day that Shepard pawned the first silver bar.[45] At trial, Shepard's oldest daughter Haley testified that the weekend after Shepard sold the first bar of silver, he took his daughters out for a lavish weekend of spending.[46] When Haley asked her father where he got the money, he told her he did some work for Appellant, and Appellant paid him early, but not to ask what kind of work it was.[47]

At trial, a sketch artist was temporarily excluded from a portion of jury selection, despite special accommodations being made for Appellant's parents to be present in the courtroom.[48] The trial court was unaware of the exclusion, but corrected it as soon as it was brought to his attention and allowed the sketch artist to sit in the jury box for the remainder of the day.[49] Appellant objected to the temporary exclusion the following

[43] (RR vol. 11, pp. 74-81).
[44] (RR vol. 17, pp. 126-28).
[45] (RR vol. 11, p. 113).
[46] (RR vol. 15, pp. 74-75).
[47] (RR vol. 15, pp. 74-75).
[48] (RR vol. 4, pp. 18-19)
[49] (RR vol. 4, pp. 18-19).

day. Halfway through the presentation of evidence, the trial court excused spectators from the courtroom to admonish the attorneys on appropriate courtroom decorum, but several members of the public remained in the courtroom.[50] Appellant objected at the time of the ruling.[51] Last, the trial court implemented a "one in, one out" rule after the courtroom reached full capacity during closing arguments. Appellant objected to the rule for the first time in his Motion for New Trial, filed after the verdict.[52] After a three-week trial, the jury returned a verdict of guilty on both counts of capital murder.[53]

[50] (RR vol. 7, pp. 1434-47).
[51] (RR vol. 7, p. 143).
[52] (CR vol. 2, pp. 737-739-40).
[53] (CR vol. 2, pp. 773, 779).

SUMMARY OF THE ARGUMENT

This Court should adopt the substantial reason test for partial courtroom closures utilized by the majority of jurisdictions across the country. Partial courtroom closures, whether they be inadvertent, incomplete, or minimal in nature, do not rise to the level of constitutional concerns like the complete courtroom closures contemplated by cases like *Waller v. Georgia*, *Presley v. Georgia*, and *Lilly v. State*. In each of the alleged closures Appellant complains of, members of the public remained in the courtroom to ensure the fairness of the proceedings. This Court should apply a common sense and well-reasoned approach to partial courtroom closures that appropriately balances an accused's constitutional rights with the practical realities of highly publicized trials that strain court's and courthouses abilities to accommodate large audiences. Because members of the public remained in the courtroom for each of the alleged closures, the trial court did not violate Appellant's right to public trial.

In its analysis of the erroneous admission of historical CSLI obtained without a warrant, the court of appeals misstated the extent of the evidence and mischaracterized the State's emphasis of that evidence. A thorough review of the evidence, done in a neutral light, shows that absent the error, the verdict would have been the same. Appellant's CSLI was not of the volume or import to move the jury from a state of non-persuasion to persuasion. Instead, it was merely cumulative of other evidence and confirmed what the jury already knew.

ARGUMENT AND AUTHORITIES

FIRST ISSUE PRESENTED

Did the court of appeals err in finding Appellant's Sixth Amendment right to a public trial was violated on three separate occasions despite evidence showing that: (1) Appellant did not preserve error for two of the three partial closures; (2) members of the public were in fact watching the proceedings during each of the three partial closures; and (3) the trial court made adequate findings to support the partial closures?

I. BECAUSE OF THE CRITICAL IMPORTANCE OF MAKING TIMELY OBJECTIONS, DIFFERENT STANDARDS OF REVIEW APPLY TO OBJECTIONS RAISED AT THE TIME OF THE ERROR AND THOSE RAISED IN A MOTION FOR NEW TRIAL.

It is well settled that a complaint that a defendant's right to a public trial was violated is subject to forfeiture.[54] The purpose of the preservation requirement is three-fold: first, it ensures that the trial court can correct any errors and eliminate the need for a costly and time-consuming appeal and re-trial; second, it guarantees opposing counsel has a fair opportunity to respond to the complaint; and third, it promotes the orderly and effective presentation of the case to the jury.[55] Both the Supreme Court and this Court have discouraged raising abstract claims as "an afterthought on appeal."[56] Indeed, the Supreme Court recently noted in *Weaver v. Massachusetts* that when a

[54] *Peyronel v. State*, 465 S.W.3d 650, 653 (Tex. Crim. App. 2015).
[55] *Monreal v. State*, 546 S.W.3d 718, 728-29 (Tex. App.—San Antonio 2018, pet. ref'd) (citing *Woods v. State*, 383 S.W.3d 775, 780 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd).
[56] *See Peyronel v. State*, 465 S.W.3d at 654 (quoting *Levine v. U.S.*, 362 U.S. 610, 620, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960)).

defendant does not simultaneously object to a public trial violation, it deprives the trial court of the opportunity to cure the violation or explain the reason for the closure.[57]

While *Weaver* dealt with an issue that is procedurally distinguishable from from the instant issue, (whether a public trial violation raised in the context of an ineffective assistance of counsel requires a showing of prejudice, despite it being classified as structural error), the opinion highlights the importance of affording the trial court the opportunity to correct any errors before it is too late.[58] Here, because Appellant did not timely object to the first and third partial closures he complains of, the trial court did not have the opportunity to address the potential errors *as they were occurring*. As a result, Appellant has waived the issues for appellate review, and the court of appeals erred in considering the issue on the merits.

A. Appellant did not object to the first and third partial closures at the earliest opportunity

For a complaint to be timely, an appellant must complain at the earliest possible opportunity, which is as soon as the party knows or should know that an error has occurred.[59] The court of appeals summarily concluded in a footnote that Appellant objected at the earliest possible opportunity to each of the complained-of closures,[60] but the record plainly refutes that conclusion as to the first and third partial closures.

[57] *Weaver v. Mass.*, -- U.S. --, 137 S.Ct. 1899, 1912, 198 L.Ed.2d 240 (2017).
[58] *See id.*
[59] *Woods v. State*, 383 S.W.3d at 780.
[60] *Dixon v. State*, 566 S.W.3d at 371 n. 27.

Appellant first alleges that a sketch artist was excluded from the morning portion of the first day of jury selection. Appellant did not object to the temporary exclusion of the sketch artist until the second day of jury selection.[61] By the time Appellant objected to the temporary exclusion, the trial court had already remedied the situation and invited the sketch artist to sit in the jury box for the remainder of jury selection.[62] Because Appellant did not object to the exclusion of the sketch artist until the following day—after the court had already remedied the issue—he did not preserve his complaint for appellate review.[63]

Next, Appellant objected to the exclusion of spectators during closing arguments for the first time in his Motion for New Trial.[64] The issue was litigated for the first time in a motion for new trial hearing, weeks after Appellant's conviction.[65] To be timely, an objection must be made at the time that the defendant knew or should have known of the alleged error.[66] As highlighted in *Weaver*, the timeliness requirement gives the trial court the opportunity to address the error as it is occurring.[67] The record from the motion for new trial hearing reflects that closing arguments spanned the course of the an entire morning, with multiple breaks given to the jurors and attorneys participating

[61] (RR vol. 4, pp. 18-19).
[62] (RR vol. 4, pp. 18-19).
[63] *See, e.g., De La Fuente v. State*, 432 S.W.3d 415, 428 (Tex. App.—San Antonio 2014, pet. ref'd) (holding that the trial judge was deprived of the opportunity, at the time of an exclusion, to take further steps to accommodate persons inside the courtroom and make any necessary findings on the record.).
[64] (CR vol. 2, pp. 737, 739-40).
[65] (*See* RR vol. 23).
[66] *Woods*, 383 S.W.3d at 780.
[67] *See Weaver v. Mass.*, 137 S.Ct. at 1912.

in the case.[68] This leaves room for an inference that Appellant at least should have known of the issue and raised it to the trial court at that time. When an objection to a public trial violation is made after the fact, in a separate proceeding as occurred in this case, the trial court is left with limited options to address or explain the error. Because the standards of review differ between an objection to a public trial violation made at trial and an objection made in a motion for new trial, the court of appeals also erred by not distinguishing the different standard of review required by the objections to the first and third partial closures.

B. The court of appeals erred by not distinguishing the different standards of review required by the objections to the first and third partial closures

The court of appeals summarily dismissed the State's preservation argument regarding the first and third partial closures without distinguishing between the different standards of review required for objections made at trial, and those made in a motion for new trial.[69] While public trial violations are reviewed de novo, a trial court's ruling on a motion for new trial is reviewed for an abuse of discretion.[70] Because Appellant objected to the third partial closure for the first time in his motion for new trial, the court of appeals should have conducted a separate analysis under the appropriate abuse of discretion standard of review. Under that standard, a trial court abuses its discretion

[68] (RR vol. 23, pp. 27, 30-31).
[69] *Dixon*, n. 27.
[70] *Webb v. State*, 232 S.W.3d at 112.

if no reasonable view of the record could support the trial court's ruling.[71] Under this deferential standard of review, a reviewing court views the evidence in the light most favorable to the trial court's ruling, without substituting its judgment for that of the trial court.[72] The trial court's ruling should be upheld so long as it falls within the zone of reasonable disagreement.[73]

The motion for new trial record supports an implicit finding that Appellant did not timely object to the third exclusion, and that there was not a complete closure of the courtroom.[74] The record from the motion for new trial hearing reflects that closing arguments spanned the course of an entire morning, with multiple breaks given to the jurors and attorneys participating in the case.[75] The record reasonably supports inference that Appellant at least should have known of the issue and raised it to the trial court at that time.[76] Importantly, the findings contain no reference to any objection made to the third alleged closure or the trial court's ruling on the matter.[77] The trial court also found that the courtroom was filled to capacity with spectators.[78] Thus, the

[71] *Monreal v. State*, 546 S.W.3d at 722.
[72] *Id.*
[73] *Id.*
[74] (*See* RR vol. 23, pp. 26-27, 30-31, 35).
[75] (*See* RR vol. 23, pp. 26-27, 30-31, 35).
[76] (*See* RR vol. 23, pp. 26-27, 30-31, 35).
[77] (4th Supp. CR, pp. 30-31).
[78] (4th Supp. CR, p. 31).

record also reasonably supports an inference that Appellant did not meet his burden under *Lilly* of proving there was a closure.[79]

Because the court of appeals did not apply the appropriate standard of review to Appellant's third closure complaint, it improperly dismissed the State's preservation argument without giving proper deference to the trial court's findings. The Court of Appeals should have reviewed the third closure complaint for abuse of discretion separately from the first and second closure complaints. Because Appellant did not preserve the first and third closures for appellate review, the court of appeals erred in deciding those partial closures on the merits. Even if error was preserved, however, the court of appeals erred by refusing to determine the nature and extent of the closures.

II. INCOMPLETE CLOSURES OF THE COURTROOM, SUPPORTED BY SUBSTANTIAL REASONS, DO NOT VIOLATE AN ACCUSED'S RIGHT TO PUBLIC TRIAL.

A central tenet of American criminal jurisprudence is that the accused are tried fairly.[80] Part of the fair trial mandate includes a constitutionally guaranteed right to a public trial.[81] The American rule of the right to a public trial has its roots in English common law, which likely stems from the abusive practices of the Spanish Inquisition, the English Court of Star Chamber, and the French monarchy's abuse of the lettre de

[79] *Cameron v. State*, 490 S.W.3d 57, 68 (Tex. Crim. App. 2014) (op. on reh'g) (*Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012)).
[80] *See Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).
[81] U.S. CONS'T. 6th amend.

cachet. Those institutions represented a historical threat to the liberty we cling to so tightly.[82]

While courts and scholars have uniformly recognized that the public trial guarantee was created for the benefit of the defendant, members of the public and the press also receive an ancillary benefit from the right.[83] The guarantee allows for the public to see that an accused is tried fairly, not unjustly condemned, and to keep the factfinders keenly aware of the gravity and importance of their function.[84] At its core, the public-trial guarantee ensures that judges and prosecutors carry out their duties responsibly, and discourages perjury.[85] Together, these aspects of the right to public trial ensures that the accused is tried openly and fairly.[86]

Traditionally, a violation of the right to a public trial is a structural error that requires no showing of harm.[87] "The right to public trial is not absolute, however, and must be balanced against other interests essential to the administration of justice."[88] Generally, a public trial violation occurs only where there has been a complete and prolonged closure of the courtroom when no countervailing or overriding interest is

[82] *In re Oliver*, 333 U.S. 257, 266, 269, 68 s.Ct. 499, 92 L.Ed.2d 682 (1948).
[83] *See Waller v. Georgia*, 467 U.S. at 46; *see also In re Oliver*, 333 U.S. at 270 n. 25.
[84] *See In re Oliver*, 333 U.S. at 270 n. 25.
[85] *See id.*
[86] *Id.* "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer on our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. at 270.
[87] *Waller*, 467 U.S. at 49-50, *Lilly v. State*, 365 S.W.3d at 328.
[88] *U.S. v. Osborne*, 68 F.3d 94, 98 (5th Cir. 1995).

served.[89] There is little question that complete and prolonged closures of the courtroom strike at the heart of the right to a public trial.

Inadvertent or partial closures, however, do not raise the same concerns. It is well established that trial courts must strike a delicate balance between protecting an accused's rights and the orderly administration of justice.[90] Matters such as courtrooms filled to capacity and ensuring proper courtroom decorum are significant issues that trial courts are required to address, and do not put courts at odds with an accused's right to public trial.[91]

In a concurring opinion, Chief Justice Warren defined a trial as public if "in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, . . . when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings."[92] It follows, then, that the exclusion of only some members of the public from the courtroom for a brief period of time does not necessarily mean that an accused has been denied his right to a public trial. The concerns upon which the right was

[89] *Id.*
[90] *Id.*
[91] *Cameron v. State*, 490 S.W.3d 57, 68 (Tex. Crim. App. 2014) (op. on reh'g) (noting that some courts have "held that partial closures are permissible to exclude certain spectators when it is deemed necessary to preserve order in the courtroom.").
[92] *Estes v. Texas*, 381 U.S. 532, 584, 85 S.Ct. 1628, 1654, 14 L.Ed.2d 543 (1965) (Warren, C.J., concurring).

predicated are not raised when at least some members of the public and the defendant's family remain in the courtroom to ensure the fairness of the proceedings.[93]

To prevail on a claim of a public trial violation, a defendant must first show that the trial was in fact closed to the public.[94] "To determine if a trial was closed, a reviewing court should look to the totality of the evidence, rather than whether a spectator was actually excluded from trial. If the defendant's trial was closed, the reviewing court *then* must decide whether the closure was proper."[95] This Court has recognized that "some courts, both state and federal, 'have held that the Sixth Amendment test laid down in *Waller* need be less stringent in the 'partial' closure context; that is to say, a 'substantial reason,' rather than an 'overriding interest,' may warrant a closure which ensures at least some public access."[96] While this Court has never had the opportunity to directly decide the issue, it appears that every federal circuit recognizes some form of the "substantial reason" test or a triviality standard for partial or trivial closures.[97] There is a general consensus that partial closures, analyzed on a case by case basis, do not necessarily rise to the level of a constitutional violation. This Court should adopt the test it recognized

[93] *Cameron v. State*, 490 S.W.3d at 68 (citing *Garcia v. Bertsch*, 470 F.3d 748, 753 (8th Cir. 2006).
[94] *Cameron v. State*, 490 S.W.3d at 68 (citing *Lilly v. State*, 365 S.W.3d at 331).
[95] *Id.* (internal citations omitted) (emphasis in original).
[96] *Steadman v. State*, 360 S.W.3d 499, 505 n. 19 (Tex. Crim. App. 2012) (internal citations omitted).
[97] *See, e.g.*, *U.S. v. Simmons*, 797 F.3d 409 (6th Cir. 2015); *U.S. v. Cervantes*, 706 F.3d 603 (5th Cir. 2013); *Bucci v. U.S.*, 662 F.3d 18 (1st Cir. 2011); *U.S. v. Greene*, 431 Fed.Appx. 191 (3rd Cir. 2011); *U.S. v. Perry*, 479 F.3d 885 (D.C. 2007); *Braun v. Powell*, 227 F.3d 908 (7th Cir. 2000); *Peterson v. Williams*, 85 F.3d 39 (2d Cir. 1996), *cert. denied*, 519 U.S. 878, 117 S.Ct. 202, 136 L.Ed.2d 138 (1996); *U.S. v. Farmer*, 32 F.3d 369 (8th Cir. 1994); *U.S. v. Al-Smadi*, 15 F.3d 153 (10th Cir. 1994); *U.S. v. Sherlock*, 962 F.2d 1349 (9th Cir. 1989); *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984).

in *Steadman v. State* for "partial" or "trivial" closures, and require only a substantial or important interest to support the closure, "in part because a less-than-complete closure does not 'implicate the same secrecy and fairness concerns that a total closure does.'"[98]

A. There was never a complete or prolonged closure of the courtroom.

Following *Lilly*, the first step in the public trial analysis is to determine whether there was an actual closure, and the burden of proof rests on the defendant. Appellant complains of three separate "closures" throughout the course of his trial. The first is when a sketch artist was temporarily excluded from a portion of jury selection, despite special accommodations being made for Appellant's parents to be present in the courtroom. The second was when the trial court excused spectators from the courtroom to admonish the attorneys, but several members of the public remained in the courtroom. Last, the trial court implemented a "one in, one out" rule after the courtroom reached full capacity during closing arguments.

On direct appeal, the State argued that because there was never a total closure of the courtroom, Appellant's Sixth Amendment rights were not violated and the stringent *Waller* test should not be applied. Instead, the State advocated for the "substantial reason" test recognized by this Court in *Steadman v. State* and *Cameron v. State* to apply. In response, the court of appeals held that it "need not consider whether a substantial reason supported the exclusions of the public reflected by the record" because even

[98] *Cameron*, at 68.

applying a less stringent test, the court of appeals opined, the trial court's findings were inadequate to support any closure.[99] The court of appeals' ruling presupposes its own outcome. It defies logic to say that without determining the reason for the closure, the findings do not support the reason. The court of appeals impermissibly skipped *the* critical step in the analysis when it refused to consider the nature and extent of the exclusions. Because the courtroom was never completely closed, Appellant's public trial rights were not violated and the stringent *Waller* test should not apply.

i. Voir Dire

The first "closure" Appellant complains of occurred on the first day of jury selection. Courthouse security told a sketch artist that there was no room for him inside of the courtroom, and he was not allowed to enter at that time.[100] Neither of the parties to the case or the trial court were aware of the exclusion.[101] That same day, the trial court made special accommodations to allow Appellant's parents to be present during voir dire.[102] Once the court became aware that the sketch artist had been excluded, it invited the sketch artist to sit in the jury box for the remainder of voir dire.[103] Appellant did not object to the temporary exclusion until the following day of trial:

> [COUNSEL FOR APPELLANT]: I think there's plenty of room for him.
>
> I just need to make the objection that for a period of time yesterday before

[99] *Dixon v. State*, 566 S.W.3d at 373.
[100] (RR vol. 4, p. 18).
[101] (RR vol. 4, p. 18).
[102] (RR vol. 3, p. 231).
[103] (RR vol. 4, p. 19).

lunch he was excluded from the courtroom and so we object to that under –

THE COURT: For the record we don't have any extra space in the courtroom. He's seated in the jury box because of the fact we don't have a place for him to sit in the audience.[104]

As soon as the trial court was apprised of the situation, it made accommodations for the artist to sit in the jury box for the remainder of voir dire. Neither party requested the exclusion, and the trial court did not intentionally exclude the sketch artist.[105] Other members of the public (Appellant's parents) were present for the proceedings and during the brief period of the time the sketch artist was excluded. The temporary and inadvertent exclusion did not rise to the level contemplated by the *Waller* and *Lilly* analyses.

ii. Attorney Admonishment

The next "closure" Appellant complained of on direct appeal was during trial when tensions were rising between the parties. The trial court found it necessary to

[104] (RR vol. 4, pp. 18-19).

[105] (RR vol. 4, p. 18). Although the court of appeals rebuked the trial court for including the lack of intent in the court's findings of facts, "courts have placed considerable emphasis on the role of the trial judge in assessing whether a closure is of constitutional magnitude and have resisted ascribing to judges the unauthorized actions of courthouse personnel." *U.S. v. Greene*, 431 Fed.Appx. at 196 (citing *U.S. v. Al-Smadi*, 15 F.3d at 154). Whether a partial closure was done intentionally or inadvertently should factor into a partial closure analysis because it goes to whether the closure was done for the purpose of a excluding a certain person or people, or was an oversight or misstep by ancillary staff that was quickly and easily corrected by the trial court, as it was in this situation. *See U.S. v. Greene*, 431 Fed.Appx. at 196.

excuse everyone from the courtroom to "admonish counsel for both sides on appropriate courtroom decorum."[106] Appellant immediately objected under *Pressley v. Georgia*, but the State pointed out that despite the trial court's order, members of the public did remain in the courtroom.[107] In its findings of fact, the trial court found that spectators remained in the courtroom to observe the proceeding.[108]

A trial court's authority to keep order in the courtroom is a "substantial reason" justifying a partial closure.[109] A court's interest in imposing reasonable restrictions on courtroom behavior in the interest of decorum is not at odds with the right to a public trial.[110] The exchange that occurred after the partial closure was akin in nature to a bench conference. "The presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interests of decorum. Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle."[111] Because the trial court was entitled to place reasonable restrictions upon courtroom behavior, and because members of the public remained in the courtroom to ensure the fairness of Appellant's trial, the

[106] (4th Supp. CR, pp. 30-31).
[107] (RR vol. 7, pp. 143-45).
[108] (4th Supp. CR, pp. 30-31).
[109] *Andrade v. State*, 246 S.W.3d 217, 225 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd); *see also Cosentino v. Kelly*, 102 F.3d 71, 73 (2nd Cir. 1996) (upholding a partial closure to preserve order in the courtroom).
[110] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n. 23, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring).
[111] *Id.*

temporary and partial closure did not rise to the level contemplated by the *Waller* and *Lilly* analyses.

iii. Closing Arguments

Last, Appellant complains of the "one in, one out" rule the trial court implemented during closing arguments after the courtroom reached full capacity, claiming this rule violated his right to public trial. The trial court's findings reflect that the trial was moved to the largest courtroom in the Lubbock County Courthouse to accommodate the highly publicized trial.[112] The trial court also found that during closing arguments, the courtroom was filled to capacity.[113] In defining what the right to public trial really means, at least one Supreme Court Justice has opined that the exclusion of spectators from a full courtroom that cannot accommodate additional people is permissible.[114] Because members of the public remained in the courtroom, Appellant's public trial rights were not violated, and Appellant has failed to meet his burden of proving there was an actual closure.

[112] (4th Supp. CR, p. 30).
[113] (4th Supp. CR, P. 31).
[114] *See Estes v. Texas*, 381 U.S. 532, 588-589, 85 S.Ct. 1628, 14 L.Ed.2d 543 (Harlan, J., Concurring) ("Obviously, the public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats."); *see also United States v. Shryock*, 342 F.3d 948, 974–975 (9th Cir. 2003), *cert. denied*, 541 U.S. 965, 124 S.Ct. 1729, 158 L.Ed.2d 411 (2004) (no violation of defendant's Sixth Amendment public trial right where on two occasions during trial, insufficient seating space prevented some of defendant's family from being in court room).

B. Common sense dictates that partial closures of a courtroom do not rise to the level of structural error.

In *Steadman*, this Court has recognized that "some courts, both state and federal, 'have held that the Sixth Amendment test laid down in *Waller* need be less stringent in the 'partial' closure context; that is to say, a 'substantial reason,' rather than an 'overriding interest,' may warrant a closure which ensures at least some public access."[115] Every federal circuit recognizes some form of a substantial reason test, a triviality standard for minimal closures, or some combination of the two. In the case of a partial closure, the Fifth Circuit has held that "a trial court should look to the particular circumstances of the case to see if the defendant will still receive the safeguards of the public trial guarantee," recognizing that partial closures do not "raise the same constitutional concerns as a total closure, because an audience remains to ensure the fairness of the proceedings."[116] Instead, the Fifth Circuit—along with the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. circuits—asks whether a substantial reason existed to justify the partial closure or whether the closure was so minimal or trivial that it did not implicate constitutional concerns.

The circuits that employ the substantial reason test differ on whether the remaining the remaining *Waller* factors apply in the partial closure context. Specifically, the circuits vary on whether the stringent findings requirement from *Waller* applies in

[115] *Steadman*, 360 S.W.3d at 505 n. 19 (internal citations omitted).
[116] *U.S. v. Osborne*, 68 F.3d at 98-99.

the partial closure context. In *U.S. v. Osborne*, the Fifth Circuit held that the partial closure was completely distinguishable from *Waller*, and upheld a partial closure even though the trial court did not create a detailed record on the partial closure issue.[117] The Fifth Circuit instead inferred from the record that the trial court ordered the partial closure based on a substantial reason (the protection of a minor from emotional harm).[118] Even jurisdictions that apply a hybrid substantial reason/*Waller* test relax the findings requirement: "In a partial closure context such as this one, a reviewing court may examine the record itself to see if it contains sufficient support for the closure, even in the absence of formal or express findings by the judge."[119]

Because partial closures do not raise the same constitutional concerns as a total closure, reviewing courts should be able to consider the trial court's findings as well as any evidence in the record that supports the closure. This Court should reverse the lower court's holding that the trial court's findings were inadequate to support any closure. Because there was never a complete or prolonged closure of the courtroom, the trial court's findings—coupled with the record evidence—are sufficient to support the partial closures.

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[117] *Id.* at 99.
[118] *Id.*; *see also U.S. v. Cervantes*, 706 F.3d. 603 (5th Cir. 2013) (analyzing whether there was a substantial reason to support the partial closure of a courtroom, and declining to apply the remaining *Waller* factors).
[119] *Comm v. Cohen*, 921 N.Ed.2d 906, 115-16 (Mass. 2010).

III. THE TRIAL COURT'S FINDINGS ARE ADEQUATE TO SUPPORT THE INADVERTENT AND PARTIAL CLOSURES.

In support of the above enumerated exclusions, the trial court made the following findings, which the court of appeals held were inadequate:

> 1. At both trials, the Court quickly became aware that due to trial publicity, a larger courtroom would be needed. The Court moved the trial to the largest courtroom in the Lubbock County Courthouse-the 72nd District Court (capacity of ninety eight [98] without added seating as compared to sixty [60] in the 140th District Court).
> 2. At both trials, special accommodations were made to seat the Defendant's parents, Mary and Perry Dixon, in the courtroom despite limited seating. Even though the courtroom was full for the voir dire examination with potential jurors, the Court made seating available for Defendant's parents on the side of the audience.
> 3. On the first day of jury selection on October 21, 2015, the Court was unaware that sketch artist Roberto Garza was excluded from the courtroom. Immediately upon learning this information, the Court invited Mr. Garza to sit in the jury box to observe voir dire.
> 4. Near the halfway point of the trial, the Court found it necessary to admonish counsel for both sides on appropriate courtroom decorum, and excluded all spectators from the courtroom to do so. Nonetheless, spectators remained in the courtroom.
> 5. During closing arguments, the courtroom was filled to capacity with spectators. Any regulation of entrants into the courtroom was done for safety reasons, to maintain courtroom decorum, and to minimize juror distraction.[120]

The court of appeals held that regardless of any purported substantial reason, the findings "are entirely inadequate to support even partial closure of the courtroom on any of the three occasions."[121] In so doing, the court of appeals abdicated its duty to

[120] (4th Supp. CR, pp. 30-31).
[121] *Dixon*, at 374.

first determine the nature and extent of the closure. The trial court's findings, coupled with the record evidence, plainly reveal that (1) there was never a complete or prolonged closure of the courtroom; and (2) a substantial reason existed for each of the partial closures.

a. Voir Dire

Many courts recognize what is referred to as a "de minimis" or "triviality standard" as applied to a closure where the closing of a courtroom is so inadvertent or slight that it does not bear upon an accused's Sixth Amendment right to public trial.[122] This common-sense approach to the public trial analysis appropriately balances an important right of the accused with the realities of large trials.

> A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer "prejudice" or "specific injury." It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment.[123]

[122] *See Comm. v. Cohen*, 921 N.Ed.2d at 919-20, n. 20 (highlighting jurisdictions that recognize de minimis closures); *Peterson v. Williams*, 85 F.3d at 44 (finding a de minimis closure where, unknown to the judge, the public was excluded for twenty minutes, unknown to judge); *United States v. Al–Smadi*, 15 F.3d at 154–155 (finding a de minimis closure). *See also Braun v. Powell*, 227 F.3d at 917–920 (holding that the exclusion of one person did not violate public trial right). In his response to the State's Petition for Discretionary Review, Appellant cites *U.S. v. Gupta*, 699 F.3d 686 (2nd Cir. 2011), as "doubting the viability of a triviality exception to closed courtroom structural error." (App. Resp. to State's Pet.). To the contrary, *U.S. v. Gupta* acknowledged the Second Circuit's acceptance of a triviality standard before declining to acknowledge the standard's outer boundaries because they were clearly distinguishable from the intentional and prolonged closure in *Gupta*. *See id.* at 688-89.

[123] *Peterson v. Williams*, 85 F.3d at 42.

In *U.S. v. Greene*, the appellant argued his right to public trial was violated when courthouse security temporarily excluded his brother from a morning of jury selection.[124] Noting that not every improper partial closure implicates Sixth Amendment concerns, the Third Circuit focused the analysis on the extent of the closure, balanced against the values advanced by the public trial guarantee.[125] Relying on precedent from its sister courts, the Third Circuit noted the growing consensus that *Presley* did not fundamentally alter the nature of the widely recognized triviality inquiry, and that the appellant "did not suffer harm of constitutional dimension" when a court security officer temporarily excluded the appellant's brother from the courtroom.[126]

The exclusion of the sketch artist at Appellant's trial fits within a de minimis or trivial closure scenario. As soon as the trial court was apprised of the situation, it made accommodations for the artist to sit in the jury box for the remainder of voir dire.[127] Other members of the public (Appellant's parents) were present during the proceedings.[128] The trial court did not intentionally exclude the sketch artist.[129] There was never a complete or prolonged closure that rose to the level of exclusion contemplated by *Presley* and *Waller*. As a result, the court of appeals improperly analyzed the issue as if there was a complete closure of the courtroom.

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[124] *U.S. v. Greene*, 431 Fed. Appx. at 193-94.
[125] *Id.* at 195.
[126] *Id.* at 195-96.
[127] (RR vol. 4, pp. 18-19).
[128] (RR vol. 3, p. 231); (4th Supp. CR, pp. 30-31).
[129] (RR vol. 4, pp. 18-190; (4th Supp. CR, pp. 30-31).

b. Attorney Admonishment

At one point during trial, the trial court found it necessary to excuse members of the public from the courtroom to "admonish counsel for both sides on appropriate courtroom decorum."[130] A trial court's authority to keep order in the courtroom is a "substantial reason" justifying a partial closure.[131] A court's interest in imposing reasonable restrictions on courtroom behavior in the interest of decorum is not at odds with the right to a public trial.[132] The exchange that occurred is indistinguishable from a bench or sidebar conference used by trial courts to maintain order in the courtroom.[133]

The partial closure also fits well within a trivial or "de minimis" analysis because it was so brief that it did not strike at the core of Appellant's right to a public trial. Although Appellant urges "it is not at all clear" that a closure can be de minimis post-*Pressley*, federal circuits have continued to acknowledge and apply the standard.[134] As with the two other alleged closures, members of the public remained in the courtroom to observe the proceedings.[135] Because the court of appeals refused to consider the reason for the exclusion, its holding is inconsistent with that of sister courts that have

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[130] (4th Supp CR, pp. 30-31); (RR vol. 7, p. 146). "THE COURT: Well, there's going to be a $500.00 fine for everybody that makes some comment other than asking questions. These side-bar comments are going to stop, or you're going to start writing checks, every one of you. Anybody have any questions about that?" (RR vol. 7, p. 146).
[131] *Andrade v. State*, 246 S.W.3d at 225.
[132] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 598 n. 23 (1980) (Brennan, J., concurring).
[133] *See Wilder v. U.S.*, 806 F.3d 653, 660-61 (1st Cir. 2015), cert. denied, --U.S.--, 136 S.Ct. 2031, 195 L.Ed.2d 233 (2016) (stating that procedures that are the functional equivalent of sidebar conferences do not constitute complete closures).
[134] *U.S. v. Greene*, 431 Fed. Appx. at 195 ("Court's have continued to conduct triviality analyses in the wake of *Presley's* holding that the Sixth Amendment extends to voir dire proceedings.").
[135] (4th Supp. CR, p. 31).

held maintaining courtroom decorum is a substantial reason for the exclusion of certain persons during trial.[136]

c. Closing Arguments

The trial court justified the regulation of entrants during closing arguments for safety reasons, to maintain courtroom decorum, and to minimize juror distraction.[137] There is little dispute as to whether, during closing arguments, the courtroom was full or almost full. The trial court's findings state the courtroom was filled to capacity.[138] As noted in *Estes v. Texas*, the exclusion of spectators from a full courtroom that cannot accommodate additional people is permissible.[139] Similar to the de minimis closure during voir dire, courts should take a common sense approach to the public trial analysis and hold that where members of the public are in fact watching the proceeding, partial closures with sufficient justification do not tread on an accused's right to public trial or rise to the level of structural error.

IV. CONCLUSION

As it stands, the court of appeals' decision is unworkable. Any closure or exclusion of persons from a public courtroom, no matter how slight or inadvertent, or how many members of the public, press, or the defendant's family remain in the

[136] *Andrade*, 246 S.W.3d at 225.
[137] (4th Supp. CR, pp. 30-31).
[138] (4th Supp. CR. Pp. 30-31).
[139] *See Estes v. Texas*, 381 U.S. at 588-589 (Harlan, J., Concurring) ("Obviously, the public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats.").

courtroom, now leads to automatic reversible error in the absence of scrupulous and exacting findings by the trial court. The opinion leaves one wondering what a trial court is supposed to do, having already moved the trial to the largest courtroom in the courthouse and still unable to accommodate all of the potential spectators. Is a packed courtroom not public? Should trial courts statewide now have to consider renting out auditoriums or stadiums for trial proceedings lest not one potential spectator be excluded? What about highly publicized trials in small counties far less equipped than Lubbock County to seat hundreds of people, press, and supporters? How should those counties reconcile the court of appeals opinion with a courtroom that seats only a few dozen people? This Court should correct the court of appeals reasoning and apply the realistic, common-sense approach to the Sixth Amendment analysis applied by the rest of the country.

SECOND ISSUE PRESENTED

Did the court of appeals err in its harm analysis by overemphasizing the impact of the admission of the CSLI evidence as important to impeach Appellant's credibility when Appellant's credibility was damaged from the outset, and the admission of CSLI evidence was limited and merely cumulative of other evidence showing Appellant's credibility?

I. BY NOT REVIEWING THE EVIDENCE IN A NEUTRAL LIGHT, THE COURT OF APPEALS MISSTATED THE EXTENT OF APPELLANT'S CSLI EVIDENCE AND MISCHARACTERIZED THE STATE'S EMPHASIS OF THAT EVIDENCE.

On direct appeal, Appellant argued that the State's acquisition of his historical cell site location information (CSLI) with a court order was a warrantless search done in violation of the Fourth Amendment. After briefing and oral argument by both parties had concluded, but Appellant's case was still pending on appeal, the United States Supreme Court issued its opinion in *Carpenter v. United States*, 585 U.S. --, 138 S.Ct. 2206 (2018) on June 22, 2018, holding that the government's acquisition of CSLI was a search under the Fourth Amendment requiring a warrant. That same day, Appellant filed a letter brief notifying the court of appeals of intervening authority bearing on the issues raised in the present appeal. The State filed a motion for leave to file a supplemental brief in light of *Carpenter*. On June 25, 2018, the court of appeals directed Appellant to file a supplemental brief discussing what, if any, impact the *Carpenter* opinion should have on the resolution of the instant appeal, and the State to respond. Following

supplemental briefing by both parties, the court of appeals reversed Appellant's conviction and held that it could not conclude that the erroneously admitted CSLI did not contribute to Appellant's conviction beyond a reasonable doubt.[140]

A reviewing court reviews a ruling on a motion to suppress using a bifurcated standard of review.[141] A trial court's findings of historical facts and determinations that turn on credibility and demeanor are reviewed for an abuse of discretion.[142] A trial court's legal conclusions are reviewed de novo.[143] When a trial court denies a motion to suppress, that ruling can be upheld under any theory of law applicable to the case.[144]

By concluding that the Admission of Appellant's CSLI data at trial warranted reversal, the Court of Appeals created an impossible standard by which any constitutional violation warrants reversal without review. At best, the opinion created a de facto rule that the admission of an accused's CSLI data, obtained without a warrant, cannot be overcome. But that is not what rule 44.2(a) demands. Instead, a reviewing court should review *all* of the evidence in a neutral light to determine whether there is a reasonable possibility the error might have contributed to the conviction. While constitutional error necessarily carries serious implications, it does not require automatic reversal, and remains subject to a proper harm analysis.[145] Under the seminal

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[140] *Dixon*, at 370-71.
[141] *Guzman v. State*, 955 S.W.2d 85, 87-91 (Tex. Crim. App. 1997).
[142] *Id.*
[143] *Id.*
[144] *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019), *cert. denied*, --S.Ct.--, 2019 WL 1755645 (June 24, 2019).
[145] *Carter v. State*, 463 S.W.3d 218, 227 (Tex. App.—Amarillo 2015, no pet.).

test laid out in *Chapman v. California*, a federal constitutional error "did not contribute to the verdict obtained" if the verdict "would have been the same absent the error."[146]

Traditionally, courts have relied upon four non-exclusive factors in conducting a constitutional harm analysis.[147] They are: "(1) The nature of the error, (2) the degree of its emphasis by the State, (3) the probable implications of the error, and (4) the weight it was likely assigned by the jury during deliberations."[148] Courts have also applied the harm factors from *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) in analyzing the impact of constitutional harm.[149] Those factors are the importance of the evidence to the State's case, whether the evidence was cumulative of other evidence, the presence or absence of other evidence corroborating or contradicting the evidence on material points, and the overall strength of the State's case.[150] In addition, this Court has also held that it "must consider any other factor, as revealed by the record, that may shed light on the probable impact of the trial court's error on the minds of average jurors."[151] The court of appeals briefly acknowledged only the non-exclusive *Snowden* factors before completely disregarding them in favor of its own analysis.

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[146] *See Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007) (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d. 705 (1967).
[147] *See Carter v. State*, 463 S.W.3d at 227.
[148] *Id.* (citing *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011)).
[149] *See Jones v. State*, 571 S.W.3d 764, 770 (Tex. Crim. App. 2019).
[150] *Clay v. State*, 240 S.W.3d at 904.
[151] *Id.*

A. The nature of the error

When the Supreme Court characterized the acquisition of CSLI as a search, a warrant was required to obtain that information absent a Fourth Amendment exception.[152] It follows that when the Fourth Amendment has been implicated, the nature of the intrusion is constitutional in nature. While constitutional error carries serious implications, it does not require automatic reversal and remains subject to a harm analysis.[153] Here, the trial court admitted evidence—Appellant's historical CSLI obtained with a court order—that was later rendered unconstitutional by the United States Supreme Court. Nevertheless, the two days' worth of data that was presented to the jury was only a fraction of the evidence implicating Appellant in the murder-for-hire plot.

B. The degree of emphasis

Erroneously admitted evidence can vary in the degree of harm it has on an accused. Evidence mentioned in passing is substantially less harmful than critical pieces of evidence that the sponsoring party repeatedly highlights, or that supports an element of the offense.[154] Here, the State mentioned Appellant's physical location in relation to his CSLI only four times over the course of a three-week trial.[155]

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[152] *See Carpenter*, 138 S.Ct. at 2221.
[153] *Carter v. State*, 463 S.W.3d at 227.
[154] *See, e.g.*, *id.* at 227-28.
[155] *But cf. Carter*, at 227-28 (noting that over two-thirds of the State's exhibits depicted unlawfully acquired evidence, requiring reversal).

The first reference to Appellant's CSLI by the State was eleven-days into trial through the State's cell-tower expert, Corporal Lindly.[156] The focus of the CSLI presentation was unquestionably Shepard's location during the months preceding the murder.[157] The State presented evidence of Shepard making frequent trips to Lubbock over the course of several months prior to July 2012. In Lubbock, Shepard would ping off cell towers close in location to Richelle's home, Dr. Sonnier's home, and the dance studio (D'Venue) where Dr. Sonnier and Richelle met and continued to attend. The CSLI showed that on March 12, 2012, both Appellant and Shepard traveled to Lubbock, and were pinging off the same or similar towers around the same general times.[158] The cell tower that Appellant and Shepard hit most frequently was the one near the D'Venue dance studio.[159] Later in the evening, Appellant and Shepard hit the same towers traveling back to Amarillo.[160]

Further proving that Appellant traveled to Lubbock on March 12, Appellant entered portions of his own American Express credit card statement, which showed him making purchases in Plainview, Texas—the halfway point between Amarillo and Lubbock.[161] On direct examination, Appellant admitted that he traveled to Lubbock on

[156] (RR vol. 11, p. 74).
[157] *See generally* (RR vol. 11, pp. 28-165).
[158] (RR vol. 11, pp. 74-81).
[159] (RR vol. 11, pp. 79, 80-81).
[160] (RR vol. 11, pp. 80-81).
[161] (RR vol. 17, pp. 126-28); (RR vol. 18, pp. 150-52); (RR vol. 19, pp. 87, 92) (Def. Ex. 116).

March 12, 2012, but denied making the trip with Shepard.[162] Appellant himself admitted the same evidence that his CSLI showed, without objection.[163]

The second—and last—date the State presented Appellant's CSLI for was June 15, 2012—the day that Shepard pawned the first silver bar Appellant gave him.[164] There was no dispute as to this testimony—at the same time Shepard pawned the silver bar, Appellant was pinging off a cell tower near his medical office.[165] There was but one mention of Appellant's location on this date and nothing more. The State did not further emphasize or elaborate on this evidence.

The State did not mention Appellant's CSLI again until two weeks later in closing argument.[166] The State's open of closing went through the times Shepard and Appellant hit Lubbock cell towers on March 12, 2012, reminding the jury that he denied traveling to Lubbock with Shepard.[167] Appellant made no mention of the March 12, 2012, trip to Lubbock in his closing argument. In sum, the State asked the jury: "Is there any doubt in your mind now that Mike Dixon was with Dave Shepard on the D'venue on the March the 12? He looked you in the eye and said, 'Nope, never been to Lubbock

[162] (RR vol. 17, pp. 126-28); (RR vol. 18, pp. 150-52); (RR vol. 19, pp. 87, 92).
[163] (Def. Ex. 116). Any alleged error "regarding the admission of evidence is cured when the same evidence comes in elsewhere without objection." *Moore v. State*, No. 07-13-00270-CR, 2014 WL 1691519, at *1 (Tex. App.—Amarillo April 24, 2014, no pet.) (not designated for publication) (citing *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003); *Walker v. State*, No. 07-10-00299-CR, 2011 Tex. App. LEXIS 8381, at *12 (Tex. App.—Amarillo Oct. 20, 2011, pet. ref'd)).
[164] (RR vol. 11, p. 113).
[165] (RR vol. 11, p. 113).
[166] (RR vol. 22, pp. 38-39, 96).
[167] (RR vol. 22, pp. 38-39).

with Dave Shepard before.' And we—all these things hinge on the credibility of this Defendant."[168] The State used the March 12 trip to Lubbock to show Appellant's level of participation in the scheme, and to attack his credibility. But the CSLI was only one way in which the State showed Appellant was lying.[169]

The court of appeals incorrectly conflated *mentioning* the evidence with *emphasizing* it. The State did not mention Appellant's CSLI in opening statements. In closing arguments, the State detailed the multitude of Appellant's lies throughout the investigation and trial, and noted that his CSLI on March 12 showed his deception. In its final closing argument, the State spent approximately 4 of 550 lines discussing Appellant's CSLI.[170] Less than one percent of the State's final closing argument that was spent discussing Appellant's CSLI on March 12. Thus, the court of appeals mischaracterized the State's emphasis of Appellant's CSLI evidence when it held that it formed a "large part" of the State's argument that Appellant was not credible.

C. The probable implications of the CSLI

Appellant did not deny that he physically traveled to Lubbock on March 12, 2012.[171] In fact, the credit card records he offered at trial corroborated that fact.[172] Thus, the implication of the State's evidence on that day was that Appellant was physically with Shepard, because they were pinging off the same towers at the same time. Yet, the

[168] (RR vol. 22, p. 96).
[169] *See infra* § II.B.2.
[170] (RR vol. 22, pp. 38-39, 96).
[171] (RR vol. 18, p. 150-52); (RR vol. 19, pp. 89-90).
[172] (Def. Ex. 116); (RR vol. 18, p. 150-52); (RR vol. 19, pp. 89-90).

jury heard and saw mountains of evidence that Appellant and Shepard were working closely together at that time to stalk Richelle and Dr. Sonnier. Appellant admitted to working so closely with Shepard from the beginning, but offered an alternative story as to the motivation behind the ongoing surveillance of Dr. Sonnier. What Appellant's physical location on March 12, 2012, paired next to Shepard's physical location, showed was that he was also lying about not being with Shepard in Lubbock on that day.

But the jury heard evidence that from the time of his first interaction with law enforcement, Appellant was deceptive. Appellant failed to mention his interactions with Shepard, stated that he did not know anything about Sonnier, and acted surprised he was being contacted about the murder.[173] After the detectives left his house, Appellant immediately warned Shepard and advised him to "lay low."[174] Once implicated, Appellant's story became that Shepard was merely stalking Sonnier to take incriminating pictures of Sonnier with another woman. The jury had every reason to disbelieve Appellant and his version of events regardless of the March 12 CSLI.

The probable implications, then, of the CSLI from March 12, 2012, confirmed what the jury already knew—that Shepard and Appellant were together in Lubbock that day. The court of appeals agreed: "We agree that the State used appellant's CSLI both as circumstantial evidence of his complicity in Sonnier's murder, and to impeach

[173] (*See* State's Ex. 806); (RR vol. 6, pp. 200-207).
[174] (RR vol. 12, pp. 116-17).

appellant's testimony."[175] Nonetheless, the court of appeals overlooked that at the State was able to accomplish the same means through other evidence, and that the CSLI was merely cumulative of other evidence.

D. The weight the jury likely assigned to the error

Appellant's whereabouts on March 12, 2012, were not directly probative of the elements of the offense. That Appellant may have been in Lubbock with Shepard four months prior to the offense did not tell the jury anything they did not already know—that Appellant and Shepard were working closely together to track Dr. Sonnier's movements. The question was always for *what purpose* they were tracking Dr. Sonnier's movements. Was it to kill Dr. Sonnier, as the State alleged, or was it to take a photograph of him in a compromising position, as Appellant claimed. Appellant being in Lubbock on March 12, 2012—with or without David Shepard—did nothing to answer that question.

The court of appeals held that the foregoing argument improperly minimized the significance of the CSLI evidence first because it was "unique" because it showed Appellant physically went to Lubbock with Shepard, which went beyond the general and overwhelming evidence that Appellant and Shepard were working together, and second because the evidence was scientific and presented in a form likely to have a

[175] *Dixon*, at 365-66.

strong impact on jurors.[176] Yet a reasonable, neutral review of the record shows overwhelming evidence that Shepard and Appellant were working together. Indeed, that point was never one that Appellant denied. Again, the question was always for what purpose or "plan" were the two coordinating so closely. Appellant's physical location on that day did nothing to further answer that question, and was not likely assigned great weight by the jury.

II. ABSENT THE ERROR, THE VERDICT WOULD HAVE BEEN THE SAME.

In addition to the above-enumerated factors, this Court should also consider the importance of the evidence to the State's case, whether the evidence was cumulative of other evidence, the presence or absence of other evidence corroborating or contradicting the evidence on material points, and the overall strength of the State's case.[177] Those factors, along with "any other factor, as revealed by the record, that may shed light on the probable impact of the trial court's error on the minds of average jurors,"[178] plainly necessitate a reversal of the court of appeals opinion.

A. The evidence was not important to the State's case

The court of appeals correctly acknowledges that the trial record is complex.[179] The jury heard over 16 days of testimony from over 50 witnesses, and over 1,900 exhibits were admitted at trial. Appellant's CSLI data formed a fraction of one exhibit,

[176] *Dixon*, at 366-67. While the State did present Lindly as an expert in cell tower forensics, the majority of his testimony focused on Shepard's whereabouts. It is unlikely that Lindly's testimony as an expert alone moved the jury from a state of non-persuasion to persuasion.
[177] *Clay v. State*, 240 S.W.3d at 904.
[178] *Id.*
[179] *Dixon*, at 364.

that only one of the fifty witnesses at trial testified about.[180] Nonetheless, the court of appeals construed Appellant's CSLI data as a "large part" of the State's argument at trial that Appellant was not credible.

State's Exhibit 1757 was a PowerPoint exhibit containing maps of David Shepard and Appellant's approximate cell tower locations.[181] Of the 166 days of Appellant's data the State obtained, it showed only two dates to the jury: March 12 and June 15.[182] State's Exhibit 1757 contained sixteen maps depicting Shepard's location on March 12.[183] Of those sixteen maps, only eight included appellant's location.[184] The second—and last—date the State presented Appellant's CSLI for was June 15, 2012—the day that Shepard pawned the first silver bar Appellant gave him.[185] There was no dispute as to that testimony—at the same time Shepard pawned the silver bar, Appellant was pinging off a cell tower near his medical office.[186] There was one mention of Appellant's location on this date and nothing more. The State did not emphasize or elaborate on this evidence. And, while it is true that Detective Lindly testified for the better part of a day, only a fraction of that testimony concerned Appellant's physical location.[187]

[180] (State's Ex. 1757).
[181] (State's Ex. 1757).
[182] (State's Ex. 1757)
[183] (State's Ex. 1757)
[184] (State's Ex. 1757).
[185] (RR vol. 11, p. 113).
[186] (RR vol. 11, p. 113).
[187] (*See generally*, RR vol. 11, pp. 51-174).

Importantly, Appellant's physical location was not critical to any element of the offense. The court of appeals dismissed that argument by stating that the jury could have seen Appellant's March 12 location as evidence that Appellant was a party to the offense. That analysis overlooks the volumes of evidence implicating Appellant as a party to the offense.

B. The evidence was cumulative of and corroborated by other evidence proving the same facts

On direct appeal, the State argued—and the court of appeals agreed—that the implications of the evidence were that Appellant and Shepard were working closely together to carry out the murder, and that Appellant was a liar. The court of appeals disregarded the other evidence proving these same basic facts because the CSLI was "unique."[188] And while it is true there was no other GPS-type location evidence admitted at trial, the type of evidence has never been the focus of the analysis but rather whether the same ultimate *fact* was proved by other evidence—regardless of the type or form of evidence proving said fact. Here, the ultimate facts were Appellant's participation as a principal or party to the murder and his damaged credibility. Multiple other forms of evidence presented to the jury at trial proved those ultimate facts, giving the CSLI a mere cumulative impact.

[188] *Dixon*, at 366-67.

1. Appellant as a party to the offense

On July 11, 2012, detectives with the Lubbock Police Department spoke to Appellant at his home in Amarillo.[189] After that meeting, several coded and secretive text messages and phone calls were exchanged between Appellant and Shepard.[190] Shepard attempted to commit suicide in the days following the murder by cutting his wrists and overdosing on pills.[191] Appellant stitched Shepard's wrist and prescribed him painkillers.[192] On June 15, 2012, Shepard pawned one silver bar for $2,750.00.[193] On July 11, 2012, the day after the murder, Shepard pawned two more silver bars for a total of $5,100.00.[194] That same day, Shepard used cash to put new tires on his vehicle.[195]

Officers recovered a gun from a lake in Amarillo that was traced back to Perry Montague Dixon, Appellant's brother.[196] The cartridge casings recovered from Sonnier's residence were cycled through the firearm that was found in the lake.[197] In addition, volumes of text messages show Appellant's overt solicitation, aid, and encouragement of Shepard entering Sonnier's home to commit murder (in addition to further supporting the elements of capital murder for remuneration). The text messages

[189] (RR vol. 6, p. 193; State's Ex. 806).
[190] (*See, e.g.*, RR vol. 12, pp. 116-17).
[191] (RR vol. 8, pp. 70, 85).
[192] (RR vol. 14, p. 53; State's Ex. 1636, 1637).
[193] (State's Ex. 1629).
[194] (State's Ex. 1630).
[195] (RR vol. 13, pp. 21-24).
[196] (RR vol. 12, p. 227; State's Ex. 1631).
[197] (RR vol. 15, p. 116); (*Dixon*, at 355).

show an orchestrated plan to carry out the murder of Sonnier, and show Appellant's involvement as a party to the offense.

The text messages between Appellant and Shepard show that Appellant was in charge of the plan.[198] Shepard reported to Appellant almost daily. Appellant expressed impatience with Shepard's lack of progress, and encouraged him to have "patience" and to "hold fast" in addition to telling him to "put it on em" and "whip and spur."[199] The text messages demonstrate Appellant sweetened the carrot for Shepard to carry out the contract by throwing cigars into the mix.[200] They also show that Appellant continued to encourage Shepard's entry into Sonnier's home through the backyard, and expressed interest in the windows being locked and the lack of windows on the garage.[201] Notably, none of the aforementioned incriminating evidence hinged on Appellant's CSLI that was admitted at trial.

The jury heard from Shepard's roommate at the time of the offense—Paul Reynolds—who relayed Shepard's confession to the jury. Reynolds told the jury that Shepard confessed that Appellant paid him three silver bars to murder Dr. Sonnier.[202] Shepard revealed the ongoing surveillance in Lubbock and the details of the murder to Reynolds.[203] Shepard revealed that he and Appellant continued to work closely together

[198] (*See* State's Ex. 1625).
[199] (RR vol. 12, pp. 89, 108-10).
[200] (RR vol. 12, pp. 88-89).
[201] (RR vol. 12, p. 69).
[202] (RR vol. 8, pp. 71-78).
[203] (RR vol. 8, pp. 71-78).

after the murder as well.[204] Shepard went to Appellant's home the night of the murder where all parties agreed Appellant gave him the Cuban cigars. Appellant and Shepard went out eating and drinking the day after the murder.[205] Appellant sutured Shepard's injuries sustained during a botched suicide attempt after the murder.[206] Paul Reynolds told the jury much of this information, which put Appellant at the head of the operation. Importantly, none of this compelling evidence included Appellant's CSLI.

2. Appellant's credibility

The State also used the data to impeach Appellant's credibility—the data indicated that Shepard and Appellant were together in Lubbock on March 12, 2012, but Appellant continued to deny ever traveling to Lubbock with Shepard. Appellant's credibility, however, was damaged from the outset by other means. At trial and on appeal, Appellant proffered his own version of events to explain away the damning text messages and exchange of silver and cigars. The jury, however, was free to disbelieve any or all of Appellant's testimony and version of events.

The jury heard evidence that from the time of his first interaction with law enforcement, Appellant was deceptive. Appellant failed to mention his interactions with Shepard, stated that he did not know anything about Sonnier, and acted surprised he was being contacted about the murder.[207] After the detectives left his house, Appellant

[204] (RR vol. 8, p. 86).
[205] (State's Ex. 805, 1635).
[206] (RR vol. 8, p. 86).
[207] (State's Ex. 183).

immediately warned Shepard and advised him to "lay low."[208] Once implicated, Appellant's story became that Shepard was merely stalking Sonnier to take incriminating pictures of Sonnier with another woman. The jury had every reason to disbelieve Appellant and his version of events regardless of the March 12 CSLI.

In closing arguments, the State talked about Appellant lying to law enforcement, deleting the text messages on his phone, lying about why he gave booties to David Shepard, about not giving his gun to Shepard, whether he knew the cigars were ready on July 11, about the silver bars being an investment, and about his finances:[209]

> This is a man that manipulates everybody. He lies when his butt's in a crack and has no problem with it. And does it like that. He hides money. He manipulates assets. He lies to his divorce attorneys, to the Courts, to the IRS, to his business partners, to the police, to juries—[210]

The CSLI evidence was but one small piece of the puzzle depicting Appellant as deceptive.

C. The remaining case against Appellant is strong.

The pillars upon which Appellant's case rest do not change without the CSLI evidence against him. The text messages, the silver bars, and Reynolds' damning testimony all remain the same. Indeed, this Court need look no further than the court of appeals' opinion affirming Appellant's convictions on sufficiency of the evidence grounds. While the review is admittedly different—with the evidence viewed in a

[208] (RR vol. 12, pp. 116-17).
[209] (RR vol. 22, pp. 32, 44-45, 97-98, 108).
[210] (RR vol. 22, p. 108).

favorable light in to the verdict in a sufficiency review as opposed to a neutral one in a constitutional harm analysis—the amount of time and space the court of appeals dedicated to Appellant's CSLI is telling: a mere seven lines over the course of a fifteen page discussion of the sufficiency of the evidence. Four of those lines simply stated that the evidence "further" suggested that Appellant and Shepard were working closely together, illustrating again that the ultimate facts that the CSLI proved was cumulative of other evidence.[211] The CSLI was not the independent or sole proof of their cooperation. It did not move the jury from a state of non-persuasion to a state of persuasion.

III. CONCLUSION

Instead of reviewing the evidence in a neutral light, the court of appeals gave total deference to Appellant's version of events, misstated, and mischaracterized the State's use of Appellant's CSLI at trial. As a result, it has created an impossible standard for the State to overcome constitutional error under Rule 44.2(a), rendering the rule meaningless. The admission of the evidence did not contribute to Appellant's conviction beyond a reasonable doubt because it was a minute portion of the evidence showing Appellant's guilt, and it was cumulative of other evidence proving the same facts.

[211] *Dixon*, at 360.

PRAYER FOR RELIEF

WHEREFORE, The State respectfully requests that the Court reverse the judgment of the Seventh Court of Appeals and affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 5, 2019, a copy of this Petition for Discretionary Review was served on opposing counsel, Cynthia Orr, via the State e-filing service. I additionally certify that on this day service was made via the State e-filing service on Stacey Soule, the State Prosecuting Attorney, at information@spa.texas.gov.

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By: /s/ Lauren Murphree
Lauren Murphree

CERTIFICATE OF COMPLIANCE

Pursuant TEX. R. APP. P. 9.4(i)(3), I further certify that, relying on the word count of the computer program used to prepare the foregoing State's Response, this document contains 14,739 words, inclusive of all portions required by TEX. R. APP. P. 9.4(i)(1) to be included in calculation of length of the document.

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By:/s/Lauren Murphree
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